

Appeal from a decision of the Grand Junction District Manager, Bureau of Land Management, finding an assessment based upon an incident of noncompliance to be appropriate. D-057242.

Affirmed as modified.

1. Oil and Gas Leases: Generally -- Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

An assessment levied pursuant to 43 CFR 3163.3 as a result of an incident of noncompliance with the regulations in 43 CFR Part 3100, applicable lease terms or written order or instruction of an authorized officer is not a penalty or fine. Rather, it is in the nature of liquidated damages to cover loss or damage to the lessor from the specific incident of noncompliance. Thus, a correctly issued notice of incident of noncompliance will be the basis for the levy of a minimum assessment regardless of good faith effort to abate the condition after issuance.

2. Oil and Gas Leases: Civil Assessments and Penalties -- Regulations: Generally

An assessment levied on the basis of a successive per day amount may be reduced to a one-time charge to reflect a change in the applicable regulation regarding assessments, 43 CFR 3163.3.

APPEARANCES: Robert L. Nicholas, Jr., President, Mont Rouge, Inc.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mont Rouge, Inc., has appealed from a June 29, 1984, decision by the Grand Junction District Manager, Bureau of Land Management (BLM), finding an Incident of Noncompliance (INC) and assessment to be appropriate. The decision

followed a Technical and Procedural Review conducted at the request of appellant.

On March 9, 1984, an INC notice was issued by BLM citing appellant for four incidents of noncompliance with terms and conditions of oil and gas lease No. D-057242. However, one of the incidents cited (paragraph (2)) was not an INC, but a notation regarding the upgrading of a road, if necessary. Appellant was subsequently found to have complied with the reporting requirements stated in INC, paragraphs (3) and (4). Therefore, the only INC at issue is that described in paragraph (1). The notice states this INC to be: "(1) the wellhead blowdown shall be contained. Construct disposal pit, fence and extend ventline to the pit." The notice was received by appellant on March 16, 1984.

On April 14, 1984, appellant contacted a contractor and arranged for the contemplated construction when weather permitted. 1/ As noted in the Technical and Procedural Review report, the contractor attempted to gain access to the wellsite some time between April 14 and May 16, 1984.

On May 17, 1984, the day following the deadline for completion of the work outlined in the March 9, 1984, notice of INC, the wellsite was again inspected by BLM. On May 18, 1984, Jerry Francis, the inspecting BLM petroleum engineering technician, called appellant and advised it that a second INC had been issued because the INC Contained in the notice on March 9, 1984, had not been abated within the time specified in the notice. This second INC was apparently received on May 21, 1984. 2/

On May 30, 1984, appellant requested a technical and procedural review pursuant to 43 CFR 3165.3. In the letter appellant noted that the condition outlined in the March 9, 1984, notice of INC had been abated on May 22, 1984. A technical and procedural review was completed on June 1, 1984, and on June 8, 1984, a review report was completed and forwarded to the District Manager. On June 29, 1984, the District Manager concluded the assessments were appropriate and should stand. The apparent basis for this finding was: a) the March 9, 1984, INC was found to be technically and procedurally correct; b) the time for compliance was extended from May 15 to May 19, 1984, thus voiding the May 17, 1984, INC for failure to comply with written orders or instruction of the officer (43 CFR 3163.3(a)); and c) assessment should be based upon a continued noncompliance for a period of two days (May 21 and 22), at \$ 250 per day.

Appellant's statement of reasons does not challenge the requirement for a disposal pit or the fact that not having a disposal pit was a failure to exercise due care and diligence in preventing undue damage to the surface

---

1/ The well is located in a remote area and the access road follows a creekbed in a canyon. Rather than undertake a road rehabilitation project, the work was to be done without using heavy equipment.

2/ This INC was not made a part of the file, and the only evidence of its existence or the date of receipt is found in the appellant's statement of reasons which contains a copy of the upper third of the first page.

or subsurface resources or surface improvements as required by 43 CFR Subpart 3162. Rather, appellant argues that the time constraints placed upon it were unreasonable, considering the weather conditions at the time and difficulty encountered in finding a contractor to do the work. Appellant concludes that the "penalty" or "fine" is outrageous and is an unreasonable hardship.

[1] In order to determine the propriety of the assessment, one must first look to the purpose for an assessment. An assessment under 43 CFR 3163.3 is not considered to be either a fine or a penalty. Rather, it is in the nature of "liquidated damages" to "cover loss or damage to the lessor from specific instances of noncompliance." 43 CFR 3163.3. 3/ Thus, if a finding of noncompliance is technically and procedurally correct, a minimum assessment is properly levied, regardless of subsequent efforts on the part of lessee to comply by abatement of the noncompliance condition. Appellant has advanced nothing to demonstrate that the action taken in issuance of the March 9, 1984, INC was not technically and procedurally correct.

[2] In view of a change in the applicable regulations, described below, we need not address the question of whether BLM could properly assess appellant for each day of noncompliance after May 21, 1984. The applicable regulation, 43 CFR 3163.3, provides for liquidated damages in certain instances of noncompliance including "failure to exercise due care and diligence in preventing undue damage to \* \* \* resources or \* \* \* improvements as required by the regulations \* \* \* and the applicable lease terms." 43 CFR 3163.3(g). The specified amount of liquidated damages in the latter case is \$ 250. In addition, however, the regulation in effect at the time of issuance of the INC notice provided that the "specified loss or damage shall be applicable to each successive day of the noncompliance." 43 CFR 3163.3 (1983). The foregoing regulation, however, was amended effective October 22, 1984, deleting the provision for continuing assessment of liquidated damages for each day of noncompliance. See 49 FR 37361, 37365 (Sept. 21, 1984). 4/

---

3/ A failure to perform or commence remedial action pursuant to a notice may subject a lessee to penalty action pursuant to 43 CFR 3163.4.

4/ The preamble to this regulatory revision gave the following cogent explanation for this change:

"Section 3163.3 Assessments for noncompliance:

"Two comments suggested that certain of the assessments provided for in this section of the existing regulations are de facto penalties and should either be removed by the final rulemaking or applied under the procedures prescribed by section 109 of the Federal Oil and Gas Royalty Management Act and § 3163.3 of the existing regulations. The final rulemaking does not adopt either of these suggested changes because such assessments do not constitute penalties. While these assessments may appear to be penalties, they are merely compensation to the United States for damages to resources or existing improvements and the added administrative cost to the United States caused by reason of a lessee's failure to comply with the regulations in this part and the resultant need for regulatory action to obtain a correction of the deficiency. Since the penalty provisions in both the proposed and final rulemakings are imposed for the continued disregard of orders to correct, there is no longer a need to continue assessments during such noncompliance and, therefore, the final rulemaking

Thus, at present, BLM is only entitled to assess a one-time liquidated damages charge of \$ 250 for each incident of noncompliance arising from failure to exercise due care and diligence in preventing undue damage to resources or improvements. 5/ See 49 FR 37361 (Sept. 21, 1984). In the absence of any intervening rights which would be adversely affected or countervailing public policy considerations, we will apply the amended regulation to benefit an appellant in a case before us. James E. Strong, 45 IBLA 386 (1980). Thus, the decision of BLM will be affirmed to the extent of an assessment of \$ 250 for appellant's failure to construct a disposal pit and fence and extend a ventline to the pit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

---

R. W. Mullen  
Administrative Judge

We concur:

---

Gail M. Frazier C. Randall Grant, Jr.  
Administrative Judge

---

Administrative Judge

---

fn 4 (continued)

modifies § 3163.3 to indicate that any assessment for a violation will be a one-time charge." 49 FR 37361 (Sept. 21, 1984).

We note that the revised regulations under 43 CFR Part 3160 published Sept. 21, 1984, were suspended, in part, by notice published in the Federal Register on Mar. 22, 1985. 50 FR 11517-18. See BLM Instruction Memoranda (IM) Nos. 84-594, Change 4, and 85-384, dated Apr. 16, 1985. 5/ On Apr. 16, 1985, the Director, BLM, issued IM No. 84-594, Change 4, stating the Bureau policy for mandatory assessments for violations of 43 CFR 3163.3(c) through (j) was to have been effective Oct. 22, 1984, and "any assessments made for violations found prior to October 22, 1984, or for nonabatement where the abatement period expired prior to that date \* \* \* should be construed as discretionary actions."

The Director then authorized State Directors of BLM, with respect to presently unsettled cases, to reduce or waive any assessment imposed before Oct. 22, 1984, taking into consideration five enumerated factors "other than whether a violation existed and whether an appropriate gravity and abatement period were prescribed," including "the fact that actions taken by this Bureau on and after October 22, 1984, eliminated daily assessments."

